* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

\+ W.P.(C) 1810/2007

Date of Decision: 11th April, 2008.

ASHOK K. PARASHRAMKA .... Petitioner
Through : Mr. Mathews J. Nedumpara, Adv.

versus

UOI & ORS. ..... Respondents
Through : Mr. Rajeeve Mehra, Adv. with
Ms. Divya Chatuvedi, Adv.

CORAM:
HON'BLE MR. JUSTICE T.S. THAKUR
HON'BLE MS. JUSTICE ARUNA SURESH

1. Whether reporters of local papers may be allowed to see the judgment? Not Necessary
2. To be referred to the Reporter or not? Not Necessary
3. Whether the judgment should be reported in the Digest? Not Necessary

T.S. Thakur,J:

Appellate Authority for Foreign Exchange has, by the two orders impugned in this petition, declined to waive the pre-deposit of the amount of penalty levied against the petitioners in terms of Sections 18 (Payment of exported goods), 50 (Penalty) and 51 (Power to adjudicate) of the Foreign Exchange Regulation Act, 1973 read with sub-sections 3 and 4 of Section 49 of the Foreign Exchange Management Act, 1999. Aggrieved the petitioners have assailed the validity of the said orders apart from challenging the vires of the Constitution 39th Amendment Act, 1975 and Sections 18(2), (3), 40(4), 56 and 59 of FERA, 1973. The controversy arises in the following circumstances:

2. A memorandum dated 3rd May, 2002 was issued by the Enforcement Directorate, Ministry of Finance to M/s Panchamukhi India Pvt. Ltd. whereby the

latter and its directors Messrs Mahesh Phool Modi and Ashok Kumar Parashramka were called upon to show cause as to why adjudication proceedings as contemplated in Section 51 of the FERA, 1973 read with Section 49 of FEMA be not initiated against them for their failure to take any action to secure the receipt of export proceeds to the tune of US$ 5,19,338.60 being the value of goods supplied by them to M/s Golden Impex Trading Company, UAE, Dubai. The memorandum inter alia pointed out that the noticees had failed to take/refrained from taking any action and all reasonable steps necessary to secure the export proceeds of the aforesaid amount in the prescribed manner within the stipulated period without the permission of the Reserve Bank of India which was tantamount to a contravention of the provisions of Section 18(2) of FERA, 1973 read with Central Government notification dated 1st January, 1974 issued on the subject.

3. The adjudication proceedings initiated in pursuance of the above memorandum culminated in an order dated 26th December, 2003 passed by the adjudicating authority levying a penalty of Rs.20 lacs on the company M/s Panchmukhi India Pvt. Ltd. and Rs.4 lacs each on Sh. Mahesh Phoolchand Modi and Mr.Ashok Kumar Parashramka, its directors. The adjudication order recorded, among others, the following findings:

(i) The noticees had despite letters intimating them about the date fixed for personal hearing on 18th November, 2003, neither cared to attend the proceedings nor sent any communication seeking adjournment. Even on 22nd December, 2003, they did not appear for personal

hearing for which they gave a reason which was neither convincing nor acceptable.

(ii) The amount involved in contravention related to eight export invoices in respect of exports effected during 1999 for a value of US$ 5,19,338.60. The noticees had not taken adequate and reasonable steps to satisfy the requirements of FERA for realization of the amount covered by the aforementioned invoices. In particular, the noticees had not furnished the reply, if any, received from the authorities in UAE to the letters allegedly addressed to them, nor was any information given as to whether the buyers were contacted by the noticees.

(iii) The RBI had not granted any extension for realization of the amount beyond 31st March, 2000.

(iv) The suits filed before Kolkata High Court for recovery of the dues from the defaulting parties did not constitute a proper remedy and could not be construed as sufficient and reasonable steps taken for realizing the outstanding amounts.

(v) The circumstantial evidence available on record clearly suggested that the export proceeds had been misappropriated in collusion with Sh. Suresh Modi of Dubai.

(vi) The argument advanced on behalf of the noticees that initiation of legal proceedings in Dubai would have entailed heavy expenses was

not acceptable.

4. Aggrieved by the order passed by the adjudicating authority, the petitioner preferred an appeal before the Appellate Tribunal for Foreign Exchange and filed together with an application, an interim application seeking dispensation of pre-deposit amount. The said application was rejected by an order dated 28th August, 2007. The Appellate Tribunal noted that the order under challenge was ex facie good order especially when the appellants had failed to show any extension of time granted by the RBI beyond 31st March, 2000. The Tribunal also noted that the appellant had not denied that he was a director of the noticee company when the contravention took place and that the appellant had not pleaded any financial hardship.

5. The petitioner then filed a review application before the Tribunal which too failed and was dismissed by an order dated 22nd January, 2008. The Appellate Tribunal rejected on a prima facie basis the contention urged on behalf of the petitioners that the adjudication proceedings were legally impermissible with the repeal of FERA, 1973. Relying upon the decision of the Supreme Court in ***Gurcharan Singh Baldev Singh v. Yashwant Singh and Others*** **(1992) 1 SCC 428**, the Tribunal held that the language employed in Section 49(4) of the repealing Act clearly stipulated that all offences committed under the repealed Act would continue to be governed by the provision of the repealed Act as if that Act had not been repealed. It also noted that the appeal preferred by the petitioners was itself an appeal under Section 52(2) of FERA, 2003 read with Section 49 of

FEMA, 1999. The Tribunal also relied upon ***M/s Gammon India Ltd. v. Spl. Chief Secretary*** **(2006) 3 SCC 352** and held that in the absence of any intention to the contrary appearing in Section 49 of the repealing Act, anything done under the old Act would continue to be governed by the provisions of the said Act. On the merits of the contentions urged before the Tribunal, it noted that since the RBI had not granted any extension for realization of the outstanding amount beyond 31st March, 2000, a contravention of the repealed Act had been established. It also prima facie found that the noticee company and its director had failed to establish that they had taken reasonable steps for realizing the outstanding export proceeds.

6. On the question of financial hardship, the Court rejected the contention urged on behalf of the petitioners relying upon the decision of the Supreme Court in ***S. Vasudeva v. State of Karnataka and Ors.*** **AIR 1994 SC 923** and observed:

> "In the light of the above discussion, it is felt that no material has been brought on record requiring this Tribunal to delve into its order under review except what has been indicated above. The application for review is disposed of accordingly. The appellant is, however, permitted to make pre deposit of the penalty amount within 15 days from the date of the receipt of this order failing which this appeal will be dismissed on this ground alone. This appeal will be listed on 4th March, 2008."

7. Aggrieved by the above orders, the petitioner has filed the present writ petition as already noticed earlier.

8. We have heard learned counsel for the petitioner and perused the record. On the findings recorded by the adjudicating authority which findings have not been sworn to be perverse in nature, we are not inclined to hold that the refusal of

the Tribunal to waive the pre-deposits does not suffer from any illegality to warrant interference of this Court in its extraordinary writ jurisdiction. We say so because the material facts relating to the question of levy of penalty and its waiver are not in dispute. That the noticee company was engaged in exports and had exported goods worth the amount mentioned earlier is admitted. That the petitioner was a director of the said company during the relevant period is also not in dispute. That the sale proceeds of the exports made by the company have not been realized by the company within the stipulated period and even the extended period granted for the purpose by the RBI is also admitted. Such being the position all that remains to be examined is whether the exporter company had taken reasonable steps to pursue the buyers for realization of the amount in the country to which the exports were made. Even here the answer is in the negative. Admittedly neither the noticee company nor its directors have taken any steps for realization of the amounts covered by the goods receipts in question. The only explanation offered by the company for its failure to do so was that it would involve heavy expenditure. That explanation has been rejected by the Tribunal and in our opinion rightly so. Filing of suits in the Kolkata High Court for recovery of money from a foreign company outside the jurisdiction of that court was not an efficacious remedy that could prove the bonafides of the petitioner or the noticee company. In the course of the arguments before us, learned counsel for the petitioner even admitted that the suits have also been since dismissed for non-prosecution. This implies that even the institution of such suits was only a

pretense of an attempt to realize the sale proceeds and not a real and effective step for recovery of the outstanding amount. The adjudicating authority and the Tribunal have both concurrently rejected the case of the petitioner that they had addressed communications to authorities in UAE for recovery of the amount from the defaulting purchaser. These communications were seen and, in our opinion, rightly so as one sided, self-serving documents which had not evoked any response as admittedly no communication received from the authorities in response to the letters addressed by the petitioner have been placed on record either before the adjudicating authority or before the Tribunal. The inference drawn by the adjudicating authority from all these circumstances that the export proceeds had been misappropriated could not be said to be wholly unjustified or perverse to warrant interference.

9. That apart, on the question of financial hardship also, the Tribunal has examined the matter and rejected the case set up by the petitioner. We do not find any perversity in the view taken by the Tribunal even on that aspect. Simply saying that the petitioner is financially hard-up is not enough. Applying the ratio of the decision of the Supreme Court in **S. Vasudeva's case (supra)** as to what would constitute "undue hardship" to the present case, we are of the opinion that the petitioner has failed to provide the requisite proof of such hardship, documentary or otherwise.

10. In the circumstances, therefore, we see no reason to interfere with the orders passed by the Tribunal declining the prayer for waiver of pre-deposit. We

also consider it unnecessary for us to examine the question of validity of the provisions of the Constitution 39th Amendment Act, 1975 and Sections 18(2), (3), 40(4), 56 and 59 of FERA, 1973 in the present proceedings that arise out of ad-interim order passed by the Tribunal. We, however, reserve liberty to the petitioner to assail the validity of the provisions mentioned above if the need so arises after the Tribunal disposes of the appeal. The writ petition accordingly fails and is hereby dismissed. Time for making the deposit is, however, extended by three months from today. We make it clear that nothing stated by us in this order shall be taken to be expression of any final opinion on any aspect that may fall for determination of the Tribunal in the main appeal pending before it.

11. No costs.

T.S. THAKUR, J.

ARUNA SURESH, J.

APRIL 11, 2008
Pk.